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Eastern Region

*Attorneys for the Idaho Department of Fish and Game  
and the Idaho Water Resource Board*

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION )  
FOR PERMIT NO. 74-16187 IN THE )  
NAME OF KURT W. BIRD and )  
JANET E. BIRD )  
\_\_\_\_\_ )

JOINT MOTION BY IWRB  
AND IDFG FOR PARTIAL  
SUMMARY JUDGMENT

**MOTION**

The Idaho Water Resources Board ("IWRB") and the Idaho Department of Fish and Game ("IDFG"), by and through their counsel of record, and pursuant to the *Notice of Hearing and Scheduling Order* (Apr. 23, 2019) ("*Scheduling Order*") and Rules 260 and 565 of the Rules of Procedure of the Idaho Department of Water Resources, hereby jointly move the Hearing Officer for partial summary judgment that:

- (1) It is in the "local public interest," Idaho Code § 42-203A(5), to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage;
- (2) Efforts by local people, organizations, and governmental agencies to "reconnect" Big Timber Creek to the Lemhi River, and other local efforts to

recover fish species listed under the Endangered Species Act (“ESA”), contribute to the development of a cooperative conservation agreement intended to promote conservation of the listed species and to provide local people with protection from incidental “take” liability under the ESA;

- (3) It is not in the “local public interest,” Idaho Code § 42-203A(5), to approve a new appropriation that would result in further dewatering of Big Timber Creek or would frustrate efforts to “reconnect” Big Timber Creek to the Lemhi River; and
- (4) The principle of conservation of the water resources within the State of Idaho, Idaho Code § 42-203A(5), requires that portions of the unappropriated water in streams supporting anadromous fish should remain in the streams for the protection of fish habitat and the public interest.

Pursuant to Rule 260.03 of the Department’s Rules of Procedure, the IWRB and IDFG request oral argument on this motion. IDAPA 37.01.01.260.03.

### **SUMMARY JUDGMENT STANDARDS**

Rules 260 and 565 of the Rules of Procedure of the Idaho Department of Water Resources authorize pre-hearing motions in contested cases before the Department, and the *Scheduling Order* authorizes the filing of “dispositive motions” in this contested case. The Department relies on the standards in Rule 56 of Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. *Order Denying Motions for Summary Judgment; Order Denying Motion to Strike*, In the Matter of Application for Permit 63-34348 in the Name of Elmore County, Board of Commissioners (IDWR) (Nov. 9, 2018), at 3.

Rule 56 of the Idaho Rules of Civil Procedure authorizes motions for partial summary judgment. IRCP 56(a). Summary judgment should be granted when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law.” IRCP 56(a); *Greenwald v. Western Surety Co.*, 164 Idaho 929, 937, 436 P.3d 1278, 1286 (2019).

### **UNDISPUTED FACTS**

Application for permit no. 74-16187 seeks a permit to divert “the high flow water from Big Timber Creek, whenever it is available.” Application at 2 (item no. 12); *see also* Memorandum re: Application Review at 2 (Dec. 26, 2018) (same).<sup>1</sup> This is not the first time the Department has been asked to review an application to appropriate “high flows” in Big Timber Creek. Application no. 74-15613, which was filed in 2005, also sought to appropriate water from Big Timber Creek “during these high flow periods and any other time during the irrigation season when flows are sufficient that all of the rights called for on Big Timber Creek, Little Timber Creek, and their tributaries have been satisfied.” *Final Order*, In the Matter of Application for Permit No. 74-15613, in the Name of F. James and Paula J. Whittaker (May 10, 2011) (“*Final Whittaker Order*”), at 5.<sup>2</sup>

The *Final Whittaker Order* set forth a number of factual findings and conclusions of law regarding efforts to protect and recover ESA-listed fish species and their habitat in Big Timber Creek and the Lemhi River, and the “local public interest” values served by these efforts. The *Final Whittaker Order* included the following factual findings, among others:

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<sup>1</sup> The term “Application” as used herein refers to the document entitled “Permit Application through Legal Notice & Request for Comment Letters,” which is posted under water right no. 74-16187 on the Department’s public-access water right search database (<https://idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx>). The Application includes, among other things, the above-cited “Memorandum re: Application Review.” A copy of the Application is attached as Exhibit 151 to the *Affidavit of Michael C. Orr in Support of Joint Motion for Partial Summary Judgment* (“*Orr Aff.*”), filed herewith.

<sup>2</sup> A copy of the *Final Whittaker Order* is attached as Exhibit 152 to the *Orr Aff.*

- “During the irrigation season, diversion of water under claimed water rights often dewater Big Timber Creek in the lower portions of the stream.” *Id.* at 5.
- “Spring chinook salmon, steelhead, and bull trout inhabit the Lemhi River and some of its tributaries. Spring chinook salmon, steelhead, and bull trout are all listed as threatened species under the Endangered Species Act. The Upper Salmon River Watershed Program (formerly the Lemhi River Model Watershed), the local Soil Conservation District, various other local groups, and various state and federal entities have been working in the Lemhi River Basin attempting to restore habitat for spring chinook, steelhead, and bull trout. Some of these efforts include construction and placement of screens in diversion canals to prevent juvenile fish from being flushed into the fields with irrigation water, diversion consolidations, construction of headgates, and innovative water transactions and system reconfigurations to restore flows in streams that were previously dewatered. Restoring flows in tributary creeks presently disconnected from the Lemhi River as a result of irrigation during the summer months is a high priority. Reconnection of tributaries to the Lemhi River will open significant additional habitat for salmon, steelhead, and bull trout spawning.” *Id.* at 6.
- “Reconnection of Big Timber Creek with the Lemhi River is one of the top five projects in ranking of importance within the Lemhi River Basin.” *Id.*
- “Local landowners, local officials, local irrigation entities, model watersheds, and local governing bodies have cooperatively participated in acquiring water to reconnect tributaries of the Lemhi River to the main stem of the Lemhi River and have promoted other projects to restore and protect anadromous fish.” *Id.*
- “The reconnections, screening, improved diversion structures, and riparian habitat improvement, are components of a conservation plan, supported by the local people and agencies responsible for overseeing recovery, to protect the local people from liability should there be an incidental taking of an endangered species. If a conservation plan is approved by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, local water users are protected from liability should a spring chinook salmon, steelhead, or bull trout be killed, injured, or otherwise “taken” as a result of diversion and use of water for irrigation.” *Id.*

The “Conclusions of Law” in the *Final Whittaker Order* specifically recognized that the efforts to protect and recover ESA-listed fish species and their habitat in Big Timber Creek and the Lemhi River Basin are in the “local public interest”:

- “The purpose of the reconnection effort is to reestablish continuous flows from Big Timber Creek into the Lemhi River.” *Id.* at 8.

- “Reconnection of Big Timber Creek and the Lemhi River has been promoted through significant efforts of the local people and government agencies as one of the solutions for salmon, steelhead, and bull trout recovery. The stream reconnection and other salmon, steelhead, and trout recovery efforts by the local people contribute to the development of a cooperative conservation agreement pursuant to Section 6 of the Endangered Species Act. The plan is intended to promote conservation of species listed under the Endangered Species Act and to provide protection from incidental take liability.” *Id.*
- “It is not in the local public interest to allow a new appropriation that will result in further dewatering of Big Timber Creek that would frustrate the reconnection efforts.” *Id.*
- “Furthermore, in considering the conservation of the waters of the state of Idaho, portions of unappropriated water in streams supporting anadromous fish should remain in the stream for the protection of fish habitat.” *Id.*

The *Final Whittaker Order* thus approved application no. 74-15613 with certain conditions, including “[a] condition requiring a 13.0 cfs bypass flow,” upon which the applicant sought reconsideration. *Order Denying Petitions for Reconsideration* In the Matter of Application for Permit No. 74-15613, in the Name of F. James and Paula J. Whittaker (Jun. 13, 2011), at 2.<sup>3</sup> The order denying reconsideration expressly reaffirmed the “local public interest values in maintaining the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage,” and stated that any local public interest value in diverting all additional unappropriated water from Big Timber Creek “is outweighed by the public interest value in maintaining flow in Big Timber Creek . . . for anadromous fish protection.” *Id.*

The Department raised these same “local public interest” concerns with respect to the Application in this contested case. Shortly after receiving the Application, the Department sent a letter to the Applicant stating that “[t]he local public interest has many facets, including the effects of a proposed water use on aquatic habitat for fish and wildlife resources.” Letter from Pamela S. Skaggs, Manager Water Rights Section, to

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<sup>3</sup> A copy of the *Order Denying Petition for Reconsideration* is attached as Exhibit 153 to the *Orr Aff.* Note that water right no. 74-15613 was licensed in 2014.

Kurt W & Janet E. Bird (Oct. 30, 2018).<sup>4</sup> Like the *Final Whittaker Order*, the letter discussed at length the various cooperative efforts of “local water users, conservation districts, and federal and state agencies” since the early 1990s to implement “conservation measures intended to protect and restore habitat for ESA-listed species in the upper Salmon River watershed,” including among other things the commitment of “significant resources toward this objective” under a number of programs. *Id.*

The IDWR letter stated that “the applicant has the ultimate burden of persuasion” regarding the Water Appropriation Rules’ evaluation criteria, and requested submission of “additional information about how your proposal invokes any local public interest concerns for ESA species recovery.” *Id.* The letter further stated that if no response was received, “IDWR will assume you have no comment regarding local public interest . . . .” *Id.* The record does not include a response to the Department’s letter.

### **ARGUMENT**

This is a narrow motion for partial summary judgment. It does not seek to resolve all issues in this contested case. It seeks only to affirm that certain important legal conclusions regarding the “local public interest” reached in the Department’s proceedings on application no. 74-15613 (“the Whittaker case”) will continue to apply in this case.

In both this case and the Whittaker case, the applicants sought permits to appropriate “high flows” from Big Timber Creek for irrigation purposes. Like this case, the Whittaker case raised questions of whether approving the application would be contrary to “the local public interest,” within the meaning of Idaho Code §§ 42-203A(5) and 42-202B(3), and the Department’s Water Appropriation Rules. Idaho law defines the “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). This includes effects on “fish and wildlife resources in the

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<sup>4</sup> This letter is part of the included in the “Permit Application through Legal Notice & Request for Comment Letters,” a copy of which is attached as Exhibit 151 to the *Orr Aff.*

local area affected by the proposed use.” Water Appropriation Rule 45.01.e.ii. The Department is authorized to deny, reduce, or condition applications for uses that “will conflict with the local public interest.” Idaho Code § 42-203A(5).

The Department’s conclusions of law in the *Final Whittaker Order* established important legal principles regarding the “local public interest” in “high flow” applications in the Lemhi River Basin, especially those to divert from Big Timber Creek. The Department’s conclusions of law in the Whittaker case clearly establish that it is not in the “local public interest” to approve new applications that would result in further dewatering of Big Timber Creek or frustrate efforts to “reconnect” Big Timber Creek and the Lemhi River with continuous flows of water. *Final Whittaker Order* at 8. The Department’s conclusions of law also establish that it is not in the “local public interest,” and does not promote conservation of Idaho’s water resources, to allow all unappropriated flows in Big Timber Creek to be diverted. *Id.*; *Order Denying Petitions for Reconsideration* at 2. The Department concluded that it is in the “local public interest” to require some unappropriated flows to remain in streams in the Lemhi Basin that support anadromous fisheries. *Id.*

These legal conclusions should also apply in this case. As in the Whittaker case, the Application in this case seeks to divert “high flows” from Big Timber Creek for irrigation purposes. Many of the same ESA-related “local public interest” issues that arose in the Whittaker case are also raised by the Application in this case. *Compare Final Whittaker Order with Letter from Pamela S. Skaggs, Manager Water Rights Section, to Kurt W & Janet E. Bird* (Oct. 30, 2018). The Department has already made the legal determination that the “local public interest” in protecting and restoring ESA-listed fish species and their habitat is of sufficient importance to condition, or perhaps deny, applications to appropriate “high flows” from Big Timber Creek and other tributary streams in the Lemhi Basin.

Moreover, in making these legal determinations the Department relied largely on an extensive documentary record of the efforts to protect and restore ESA-listed fish species and their habitat in the Lemhi Basin. *Final Whittaker Order* at 5-6. The record showed that these efforts have a long history, encompass the entire Lemhi Basin, address a number of obstacles to fish and habitat recovery, are supported by many local water users and landowners as well as various organizations and government agencies, and have significant benefits for the local community. *Id.* Portions of the Whittaker case record regarding these matters are provided in the *Affidavit of Michael C. Orr in Support of Joint Motion for Partial Summary Judgment*, filed herewith. The Hearing Officer may also take official notice of these documents under the Department's Rules of Procedure. IDAPA 37.01.01.602.<sup>5</sup>

As in the Whittaker case, in this case there can be no genuine factual question as to the existence, scope, and purpose of the many efforts and programs implemented over the years to protect and restore ESA-listed fish species in the Lemhi Basin. *Final Whittaker Order* at 5-6; Letter from Pamela S. Skaggs, Manager Water Rights Section, to Kurt W & Janet E. Bird (Oct. 30, 2018). The question, rather, is the legal question of whether the "local public interest" in these efforts is sufficient to condition, reduce, or deny an application for "high flows" from stream in the Lemhi Basin that support ESA-listed fisheries. Idaho Code § 42-203A(5). The Department answered this legal question in the affirmative in the Whittaker case, and that legal conclusion should also apply in this case.

Further, this motion for partial summary judgment thus does not ask the Hearing Officer to go beyond the language of the Whittaker case. As shown below, each of the four discrete requests for summary judgment traces back directly to the legal conclusions in the Whittaker case:

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<sup>5</sup> Filed herewith is the joint motion of IWRB and IDFG that that the Hearing Officer take "Official Notice" of certain documents in the Whittaker case. IDAPA 37.01.01.602.



- (1) That it is in the “local public interest,” Idaho Code § 42-203A(5), to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage (*Order Denying Reconsideration* at 2);
- (2) That efforts by local people, organizations, and governmental agencies to “reconnect” Big Timber Creek to the Lemhi River, and other local efforts to recover fish species listed under the Endangered Species Act (“ESA”), contribute to the development of a cooperative conservation agreement intended to promote conservation of the listed species and to provide local people with protection from incidental “take” liability under the ESA (*Final Whittaker Order* at 8);
- (3) That it is not in the “local public interest,” Idaho Code § 42-203A(5), to approve a new appropriation that will result in further dewatering of Big Timber Creek or would frustrate efforts to “reconnect” Big Timber Creek to the Lemhi River (*Final Whittaker Order* at 8); and
- (4) the principle of conservation of the water resources within the State of Idaho, Idaho Code § 42-203A(5), requires that portions of the unappropriated water in streams supporting anadromous fish should remain in the streams for the protection of fish habitat and the public interest (*Final Whittaker Order* at 8; *Order Denying Reconsideration* at 2).

Affirming these legal principles will help narrow the issues for hearing and will avoid the potential for inconsistent legal interpretations of the “local public interest.” Idaho Code §§ 42-203A(5), 42-202B(3); IDAPA 37.03.08.045.01.e. The IWRB and the IDFG therefore request that the Hearing Officer grant their joint motion for partial summary judgment.


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DATED this 30<sup>th</sup> day of July, 2019.

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DARRELL G. EARLY  
Deputy Attorney General  
Chief, Natural Resources Division

  
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MICHAEL C. ORR  
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 30<sup>th</sup> day of July 2019, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

JAMES CEFALO IDAHO DEPARTMENT OF WATER RESOURCES 900 N. SKYLINE DR., STE A IDAHO FALLS, ID 83402-1718	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-525-7177 <input checked="" type="checkbox"/> Email: <a href="mailto:james.cefalo@idwr.idaho.gov">james.cefalo@idwr.idaho.gov</a>

2. Copies to the following:

IDAHO DEPARTMENT OF WATER RESOURCES ATTN: JEAN HERSLEY, TECHNICAL RECORDS SPECIALIST II 322 E. FRONT STREET, SUITE 648 BOISE, ID 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile:
ROBERT L HARRIS HOLDEN, KIDWELL, HAHN & CRAPO PLLC 1000 RIVERWALK DR., STE 200 P.O. BOX 50130 IDAHO FALLS, ID 83405	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a>
MARIE CALLAWAY KELLNER MATTHEW A NYKIEL IDAHO CONSERVATION LEAGUE P.O. BOX 2308 SANDPOINT, ID 83864	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: <a href="mailto:mkellner@idahoconservation.org">mkellner@idahoconservation.org</a> <a href="mailto:mnykiel@idahoconservation.org">mnykiel@idahoconservation.org</a>
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